



23

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No. 1142 of 2002

Dharmendra Ram Khati

Versus

State of Chhattisgarh

JUDGMENT

Post for 15.05.2007

Sd/-
Sunil Kumar Sinha
Judge

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No. 1142 of 2002****APPELLANT**

Dharmendra Ram Khati, S/o Mahesh Ram Khati, aged about 23 years, Sakin-Sohajna, Thana- Islaampur, District- Nalanda (Bihar) Halmukam, Kailash Nagar Birgaon, Thana- Urla, District- Raipur (C.G.)

Versus**RESPONDENT**

State of Chhattisgarh,
Through Police Station- Urla, District Raipur (C.G.)

Appearance:

Shri K.K. Singh, counsel for the appellant.

Shri Arun Sao, Govt. Advocate for the State.

JUDGMENT
(15.05.2007)**Sunil Kumar Sinha, J.**

(1) This appeal is directed against the judgment of conviction and order of sentences dated 3.9.2002 passed in Sessions Trial No. 334/2001 by the Sessions Judge, Raipur, whereby, the said Court, while acquitting 2 co-accused persons namely Awadhesh Yadav and Ghanshyam (accused No. 2 & 3), convicted the appellant under Sections 363, 366 & 376 I.P.C. and sentenced him to undergo R.I. for 3 years and to pay fine of Rs.2,000/-, in default of payment of fine to further undergo R.I. for 6 months; R.I. for 5 years and to pay fine of Rs.2,000/-, in default of payment of fine to further undergo R.I. for 6 months and R.I. for 8 years and to pay fine of Rs.2,000/-, in default of payment of

(25)

fine to further undergo R.I. for 6 months respectively with a further direction to run the sentences concurrently.

(2) The case of the prosecution is that on 22.4.2001, in between 00.30 'O' clock to 7 'O' clock, the appellant abducted Ku. Poornima, a girl aged about 12-13 years, from the lawful guardianship of her father with an intention to commit marriage or rape against her and thereafter he also commit rape on her. In fact, the appellant was friend of brother of the prosecutrix namely Narendra Tiwari, and was residing near the house of the prosecutrix and was frequently visiting her house. He abducted Poornima and thereafter, took her to Nalanda (Bihar) and kept her as his wife. The girl was recovered from the possession of the appellant and was brought to Raipur. According to *Dakhil Kharij Panji* of school, the date of birth of the prosecutrix was 5th August, 1988. Since the appellant was frequently visiting the house of the prosecutrix, he came in close contact with her and due to said intimacy, on the fateful day, he enticed her and took her on his bicycle to the railway station. In the way, he was assisted by co-accused Awadhesh Yadav and Ghanshyam. The appellant and the prosecutrix boarded the train and they went to Nalanda, where she resided with him as his wife and she was subjected to sexual intercourse by him.

(3) During the course of investigation, after recovery, when the prosecutrix and the appellant were brought to Raipur, they were sent for medical examination and thereafter, the evidence of age of the prosecutrix was collected. According to *Dakhil*

Kharij register, as stated above, her date of birth was 5.8.88 and in ossification test, she was found in between 12-14 years. In further investigation, her statement under Section 164 Cr.P.C. was also recorded and after completion of investigation, the charge-sheet was filed under the aforementioned Sections of I.P.C.

(4) Learned Sessions Judge, on the basis of evidence of father and mother of the prosecutrix namely Narrottam Tiwari (P.W.-1) and Smt. Kevera (P.W.-3) and also on the evidence of entries of *Dakhil Kharij* register (Ex.-P-4/A) and the mark-sheet of the prosecutrix (Ex.-P/5), which were proved by Devcharan Sonbair (P.W.-6), recorded a finding that the prosecutrix was aged about 12 years and 8 months on the date of incident. After holding so, the Sessions Judge, further on the evidence of prosecutrix Ku. Poornima (P.W.-5), convicted the appellant under aforementioned Sections I.P.C. However, the other 2 co-accused persons namely Awadhesh Yadav and Ghanshyam were acquitted. The Sessions Judge recorded a finding that since the prosecutrix is not making allegations against other co-accused persons in her court statement, therefore, they cannot be convicted on the basis of her police statement (Ex.-P/2) or on the basis of 164 statement (Ex.-D/1). About the present appellant, a finding was recorded that since the prosecutrix was kidnapped and she was so kidnapped to compel her marriage or to cause her defilement and thereafter she was subjected to

sexual intercourse, therefore, this appellant was liable to be convicted under the said Sections of I.P.C.

(5) Learned counsel for the appellant argued that the conviction and sentence awarded to the appellant are not in accordance with law as none of the offence has been proved against him.

(6) On the contrary, learned counsel for the State opposed the submissions and supported the judgment of conviction and order of sentences passed by the Sessions Court.

(7) I have heard learned counsel for the parties at length and have also perused the records of sessions case.

(8) So far as the age of the prosecutrix is concerned, admittedly, there are three sets of evidence. The first one is the evidence of father, Narrottam Tiwari, (P.W.-1) and mother, Smt. Kevra (P.W.-3). Narrottam (P.W.-1) has deposed that the prosecutrix was aged about 14 years and Smt. Kevra (P.W.-3) has stated that she was aged about 13 years. They have been put to lengthy cross-examination by the defence making references to the dates of birth of other children of the couple, but in the outcome nothing could be brought on record, which may suggest that the evidence of father and mother regarding date of birth of the prosecutrix may be disbelieved. The second set of evidence in this regard is the school certificate, according to which, the date of birth of the prosecutrix was 5.8.1988. Devcharan Sonbair (P.W.-6), who was the teacher in primary

school Udoyog Nagri was examined before the Sessions Court along with *Dakhil Kharij* register of school and he has proved the copy of the said register as Ex.-P-4/A and he has also proved one mark-sheet of the prosecutrix as Ex.-P/5, according to which, her date of birth was 5.8.88. His evidence is also intact on the point so far as it relates to entry of date of birth of the prosecutrix in school records. The third set of evidence is the ossification test conducted by Dr. Chandrapal Adwani (P.W.-14), who, after taking the X-ray of different joints of the prosecutrix, has submitted and proved his report Ex.-P/14 and has also proved X-ray plates as Ex.-P/15 and Ex.-P/16. According to his report, the prosecutrix was in between 12-14 years on the date of examination. Therefore, on the basis of these evidence available on record, it cannot be said that the Sessions Court committed an error of law in determining the age of the prosecutrix to be about 13 years and the finding in this regard is not in accordance with law.

(9) So far as the offence under Sections 363 & 366 I.P.C. are concerned, it comes in the evidence of Poornima (P.W.-5) that she was taken by the appellant on his bicycle to the railway station where they boarded the train and she was taken to Bihar. In Bihar they had gone to Nalanda where she was residing as the wife of the appellant. She also states that she was taken to Badgaon where the appellant had married her after pouring *Sindoor* on her head and had kept her along with his mother and father and younger brother. The version of

(29)

prosecutrix to this extent is clear and unambiguous but so far as question of commission of rape or sexual intercourse is concerned, her version is not uniform.

(10) Learned counsel for the appellant refers to her 164 statement (Ex.-D/1), in which, she has clearly stated that during the entire period of her stay with the appellant, the appellant has not made physical relations with her. Meaning thereby that she was not subjected to sexual intercourse by the appellant during the said period of stay with him. When she was faced with the said statement recorded under Section 164 Cr.P.C., she has given an unusual explanation that Yes, she has stated like this before the Magistrate, but, on account of fear of the police, and for this, the Court below has not given much importance to the said contradiction. This view taken by the trial Court appears to be strange, because, normally in a case filed by the police, if the prosecutrix is brought before the Magistrate for her 164 Cr.P.C. statement, the police may create a fear or pressurize the prosecutrix for deposing that the incident did had taken place, that means, if the case is one of rape, if any pressure would be made, that would be made for deposing that the rape was committed and not for that the witness or prosecutrix should depose that the rape was not committed. Such an explanation given by the prosecutrix for the said vital contradiction in between her court statement and 164 statement and its acceptance by the Sessions Court is unnatural and not correct. On this count, the Sessions Court would have atleast

20

partly disbelieved the prosecutrix so far as offence under Section 376 I.P.C. is concerned.

(11) In the opinion of this Court, the Sessions Court committed an error of law by believing the prosecutrix, so far as allegations of rape are concerned. In fact, the version of the prosecutrix, particularly with reference to the commission of rape or forceful sexual intercourse against her, is an exaggeration in her court statement as the factum of commission of sexual intercourse was an omission in her 164 statement for which a totally unnatural explanation has been offered by her, which was easily accepted by the Sessions Court and it does not inspire the confidence of this Court so as to base a conviction under Section 376 I.P.C. and conviction of the appellant under Section 376 I.P.C., based such evidence of the prosecutrix, is liable to be set aside.

(12) In the result, the appeal partly succeeds. The conviction and sentence awarded to the appellant u/ss 363 and 366 I.P.C. are maintained. However, his conviction and sentence awarded u/s 376 I.P.C. are set aside. He is acquitted of the charges framed u/s 376 I.P.C. The appeal is allowed to the extent indicated above.

Sd/-
Sunil Kumar Sinha
Judge